

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

GIFFORD PINCHOT TASK FORCE, a
Washington non-profit corporation,

Plaintiff,

v.

JANINE CLAYTON, in her official
capacity as Forest Supervisor of Gifford
Pinchot National Forest, and the UNITED
STATES FOREST SERVICE, a federal
agency,

Defendants.

CASE NO. C10-5181 JRB

ORDER GRANTING
DEFENDANTS' MOTION FOR
SUMMARY JUDGMENT AND
DENYING PLAINTIFF'S MOTION
FOR SUMMARY JUDGMENT

This matter comes before the Court on cross-motions for summary judgment. The parties agree that the Court's resolution of the motions constitutes a final ruling on this appeal from an administrative proceeding. The Court has heard oral argument and considered the pleadings filed in support of and in opposition to the cross-motions and the file herein.

INTRODUCTION AND BACKGROUND

This is an action challenging the Forest Service's planned forest-thinning project (Wildcat Thin Project) in the Muddy River and Swift Reservoir watersheds in the Gifford Pinchot National Forest (GNPF). Plaintiff, Gifford Pinchot Task Force challenges the Forest Service's Decision Notice (DN) and Finding of No Significant Impact (FONSI) as arbitrary and capricious. Plaintiff alleges violations of the National Environmental Policy Act (NEPA), the National Forest Management Act (NFMA) and the Administrative Procedure Act (APA). Both Plaintiff and Defendants move for summary judgment.

The Wildcat Thin Project on the GPNF is designed to thin tree plantations planted in the 1960s and 1970s following clearcutting in the Muddy River and Swift Reservoir watersheds. This thinning of dense, even-aged stands will allow for the remaining trees to grow and mature without competition. Administrative Record (AR) 8221-67. The Project also addresses three other needs within the area: headwater tributary enhancement, road decommissioning and removal of old, temporary road stream crossings. *Id.* The Project will occur within the GPNF's Matrix allocation, which pursuant to the Northwest Forest Plan (NWP) are lands managed for the continued production and utilization of forest resources, principally timber. AR 7986; 2167. The Project will also include the restoration of late-successional components (large multi-species trees, variable tree densities, snags and downed coarse wood) in Late Successional Reserves (LSRs) and Riparian Reserves (RRs). AR 7986-89; 2166-67. The Project includes thinning on 2,694 acres of forest plantations, commercial salvage on 11 acres of plantation affected by blowdown, and non-commercial treatment on 17 acres of stands. AR 8221-23; 7983. Small tree thinning would also occur within the clearing limits for Forest Road 2500. *Id.* The Project also

1 includes an amendment to the GPNF Land and Resource Management Plan (GPNF Forest Plan)
2 allowing for use of feller bunchers (a type of tractor harvest equipment) on slopes up to 45
3 percent within the Project units. AR 8224-26.

4 In consultation with the U.S. Fish and Wildlife Service (USFWS) and the National
5 Oceanic and Atmospheric Administration (NOAA) Fisheries, the Forest Service completed
6 Biological Assessments (BAs) for fisheries and wildlife, including bull trout and northern
7 spotted owl. AR 7587-7613; 7616-7715.

8 In December 2008, the Forest Service requested scoping comments on the Project. AR
9 7326-29. Comments were received from various interested parties, including from Plaintiff. AR
10 7478-87. In April 2009, the Forest Service published notice of the release of the preliminary
11 Environmental Analysis (EA) for a 30-day public comment period. AR 7775; 7772-73. The
12 preliminary EA summarized specific actions of the proposed action, and described the proposed
13 site-specific Forest Plan Amendment. The Forest Service received comments on the Preliminary
14 EA from various interested parties including from Plaintiff. AR 7783-92.

15 The Forest Service received a memo in May 2009 from the USFWS recommending
16 northern spotted owl limited operating periods for the Wildcat Thin Timber Sale. AR 7805-07.
17 In July 2009, the Forest Service received a Biological Opinion and letter of concurrence from the
18 USFWS for the effects to bull trout, northern spotted owls, and designated northern spotted owl
19 critical habitat from the Project's proposed action, AR 7867-7965, which included northern
20 spotted owl limited operating periods. NOAA Fisheries provided a Biological Opinion, which
21 concluded that the Project was not likely to jeopardize the continued existence of Lower
22 Columbia River coho salmon. AR 8168-8215.

23 The Wildcat Thin Timber Sale EA was completed on August 1, 2009. AR 7978-8167. A
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1 DN/FONSI and Site Specific Forest Plan Amendment were issued on August 26, 2009, by Janine
2 Clayton, the GPNF Forest Supervisor. AR 8221-67; 8268-73. Plaintiff filed an appeal of the
3 DN/FONSI on October 9, 2009. AR 8274-8302. In November 2009, the Deputy Regional
4 Forester affirmed the Decision on the Project. AR 8334; 8317-33. This litigation followed.
5 Plaintiff challenges the Forest Service Decision Notice and Finding of No Significant for the
6 Wildcat Thin Timber Sale Project as arbitrary and capricious. The parties have filed cross-
7 motions for summary judgment.

8 SUMMARY JUDGMENT STANDARDS

9 Summary judgment is proper only if the pleadings, the discovery and disclosure materials
10 on file, and any affidavits show that there is no genuine issue as to any material fact and that the
11 movant is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). The moving party is
12 entitled to judgment as a matter of law when the nonmoving party fails to make a sufficient
13 showing on an essential element of a claim in the case on which the nonmoving party has the
14 burden of proof. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1985). There is no genuine issue
15 of fact for trial where the record, taken as a whole, could not lead a rational trier of fact to find
16 for the non moving party. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586
17 (1986)(nonmoving party must present specific, significant probative evidence, not simply “some
18 metaphysical doubt.”). See also Fed. R. Civ. P. 56(e). Conversely, a genuine dispute over a
19 material fact exists if there is sufficient evidence supporting the claimed factual dispute,
20 requiring a judge or jury to resolve the differing versions of the truth. *Anderson v. Liberty*
21 *Lobby, Inc.*, 477 U.S. 242, 253 (1986); *T.W. Elec. Service Inc. v. Pacific Electrical Contractors*
22 *Association*, 809 F.2d 626, 630 (9th Cir. 1987).

1 The determination of the existence of a material fact is often a close question. The court
 2 must resolve any factual issues of controversy in favor of the nonmoving party only when the
 3 facts specifically attested by that party contradict facts specifically attested by the moving party.
 4 The nonmoving party may not merely state that it will discredit the moving party's evidence at
 5 trial, in the hopes that evidence can be developed at trial to support the claim. *T.W. Elect.*
 6 *Service Inc.*, 809 F.2d at 630. Conclusory, non specific statements in affidavits are not
 7 sufficient, and "missing facts" will not be "presumed." *Lujan v. National Wildlife Federation*,
 8 497 U.S. 871, 888-89 (1990).

9 GOVERNING STATUTES

10 National Environmental Policy Act

11 NEPA requires an agency to prepare an EIS when it proposes "major federal actions
 12 significantly affecting the quality of the environment." 42 U.S.C. § 4332(C). NEPA is designed
 13 to insure that the agency has fully contemplated the environmental effects of its action, and "to
 14 insure that the public has sufficient information to challenge the agency." *Robertson v. Methow*
 15 *Valley Citizens*, 490 U.S. 332, 349 (1989). As a preliminary step, an agency may prepare an EA
 16 to decide whether the environmental impact of a proposed action is significant enough to warrant
 17 preparation of an EIS. *Blue Mts. Biodiversity Project v. Blackwood*, 161 F.3d 1208, 1212 (9th
 18 Cir. 1998). The purpose of an EA is to provide the agency with sufficient evidence and analysis
 19 for determining whether to prepare an EIS or to issue a FONSI. *Metcalf v. Daley*, 214 F.3d
 20 1135, 14 1143 (9th Cir. 2000). If an EA establishes that an action may have a significant effect
 21 on the environment, then an EIS must be prepared. *Blue Mountains*, at 1212. If not, then the
 22 agency issues a FONSI. *Id.* The FONSI must be accompanied by a convincing statement of
 23 reasons to explain why a project's impacts are insignificant. *Id.*

1 In reviewing a challenge to the adequacy of an EA, the court applies a “rule of reason” to
2 determine whether the agency took a “hard look” at a proposed action by preparing a
3 “reasonably thorough discussion of the significant aspects of probable environmental
4 consequences.” *Kern v. U.S. Bureau of Land Mgmt.*, 284 F.3d 1062, 1071 (9th Cir. 2002).
5 Courts are not to substitute their judgment for that of the agency. *League of Wilderness*
6 *Defenders v. Allen*, 615 F.2d 1112, 1130 (9th Cir. 2010). NEPA dictates that the courts defer to
7 agency opinion if it is not otherwise shown to be arbitrary and capricious. *City of Carmel-by-the-*
8 *Sea v. U.S. Dep’t of Transp.*, 123 F.3d 1142, 1151-52 (9th Cir. 1997).

9 **National Forest Management Act**

10 NFMA mandates forest planning through the thorough analysis of environmental
11 economic impacts, coordination of multiple use and sustained yield, and public participation in
12 the development of the program. 16 U.S.C. § 1600. The agency is required to develop
13 comprehensive land and resource management plans (LRMP) for each unit of the National
14 Forest system. 16 U.S.C § 1604(a).

15 All management activities undertaken by the Forest Service must comply with the forest
16 plan, which in turn must comply with the Forest Act, which requires that wildlife habitat must be
17 managed to maintain viable populations of native and desired non-native wildlife species. In
18 order to ensure compliance with the forest plan and the Forest Act, the Forest Service must
19 conduct an analysis of each “site specific” action, such as a timber sale, to ensure that the action
20 is consistent with the forest plan. *Idaho Sporting Congress, Inc. v. Rittenhouse*, 305 F.3d 957,
21 962 (9th Cir. 2005).

22 Review of agency decision-making under NFMA is governed by the judicial review
23 provisions of the APA. *Native Ecosystems Council v. U.S. Forest Service*, 418 F.3d 953, 960

(9th Cir. 2005); *Gifford Pinchot Task Force v. U.S. Fish and Wildlife Service*, 378 F.3d 1059, 1065 (9th Cir. 2004).

Administrative Procedure Act

Judicial review of a NEPA or NFMA claim is governed by the APA, 5 U.S.C. §§ 701-06; *Native Ecosystems Council v. U.S. Forest Service*, 418 F.3d 953, 960 (9th Cir. 2005); *Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 882 (1990). Under the APA, the court may set aside agency action only if it was “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.” *Native Ecosystems Council*, at 960; *Wilderness Soc'y v. U.S. Fish & Wildlife Serv.*, 353 F.3d 1051, 1059 (9th Cir.2003). To have not acted in an arbitrary and capricious manner, the agency must present a rational connection between the facts found and the conclusions made. *Native Ecosystems Council*, at 960; *Nat'l Wildlife Fed'n v. U.S. Army Corps of Eng'rs*, 384 F.3d 1163, 1170 (9th Cir. 2004). Agencies are entitled to deference to their interpretation of their own regulations, including Forest Plans. *Native Ecosystems Council*, at 960; *Forest Guardians v. U.S. Forest Serv.*, 329 F.3d 1089, 1097, 1099 (9th Cir.2003). A court is only to assess whether the agency’s decision is “within the bounds of reasoned decisionmaking,” *Balt. Gas & Elec. Co. v. Natural Res. Def. Council*, 462 U.S. 87, 105 (1983).

ANALYSIS

NEPA COMPLIANCE

The Gifford Pinchot Task Force claims the Forest Service violated NEPA by failing to prepare an EIS. Plaintiff asserts that the Project will have a significant effect on the environment, poses unique or unknown risks, and that the mitigation measures do not render the Project insignificant.

Unique and Unknown Risks

Plaintiff's primary objection appears to be that the Forest Service did not adequately address sediment increases in the area waterways resulting from the Project. The Court rejects this contention. The Forest Service determined in its expertise, and based on previous studies and observations, to model sediment production and to qualitatively describe the sediment delivered to waterways to disclose effects of the Project. See AR 8049-53. The Forest Service created a reasonable methodology to test sediment loads and evaluate the impacts.

The Forest Service has analyzed and disclosed the relevant data regarding potential impacts of the Project on the area. See AR 8035-36, 8039-40 (effects on soil productivity); 8055-56, 8060-67 (effects on hydrology, stream sediment and water temperature); 8078-82 (effects to fisheries and fish habitat); 8089-93 (effects to LSRs); 8098-8108 (effects on threatened and endangered plant species); 8118-23 (effects to northern spotted owl); 8125-29 (effects on wildlife); 8132-33 (effects to management indicator species); 8143-44 (effects on scenery); 8148 (effects on heritage resources). The Forest Service has articulated proposals to mitigate these effects. See AR 8015 (no skidding permitted across any streams); 8015-16 (temporary road stream crossing structures will be designed to comply with standards and guidelines for permanent structures to accommodate high winter flows); 8016 (catchments will be constructed to intercept runoff from landings prior to reaching streams); 8021 (describing mitigation measures for feller buncher operations); 8020 (following completion of the Project, temporary roads will have all temporary crossing removed); *id.* (temporary landings will be subsoiled to a depth of 18 inches, creating a rough, uneven surface); 8021 (areas of gouging or soil displacement will be treated); *id.* (sediment captured in catchments will be cleaned and deposited on the forest floor away from streams); *Id.* (describing monitoring during the Project).

1 The EA provides the necessary convincing statement of reasons why the Project's
2 impacts are not significant. The Project does not present unique or unknown risks, nor will it
3 have significant effects on the environment. The Agency properly relies on mitigation measures
4 and a properly prepared EA.

5 **Cumulative Impacts**

6 The Gifford Pinchot Task Force next contends the Forest Service failed to appropriately
7 disclose and analyze cumulative impacts. The Court disagrees. The EA contains a discussion of
8 the cumulative impacts of the Project combined with other past, present, and reasonably
9 foreseeable future projects in the area. See AR 8025-26; 8035; 8039; 8061. The Forest Service
10 adequately disclosed foreseeable future activities on public and private lands. The EA also
11 adequately analyzed the cumulative effects of roadbuilding and effects on the area watersheds.
12 See AR 8026-39; 8045-81. The EA adequately analyzes the effects of the Project and Plaintiff
13 has not shown otherwise.

14 **Range of Alternatives**

15 The Gifford Pinchot Task Force next contends the Forest Service failed to analyze an
16 adequate range of alternatives. Plaintiff has failed to support this contention. The EA
17 establishes that the Forest Service analyzed an adequate range of alternatives. See AR 7793-94;
18 7995; 8227-28; 8322-24.

19 **NFMA COMPLIANCE**

20 Plaintiff argues that the Forest Service violated both NEPA and NFMA because it failed
21 to provide enough detailed analytical data to show that it met either NEPA's procedural
22 requirements or NFMA's substantive requirements.

Impacts on Late Successional and Riparian Reserves

Contrary to Plaintiff's allegations, the EA shows that the Forest Service met NEPA's procedural obligations and took the required "hard look" at the impacts of the Project on Late Successional Reserves (LSRs) and Riparian Reserves (RRs) and complied with the substantive requirements set forth in the Forest Plan. See AR 2166; 4233; 4324; 4364-67; 7986-87; 8007. The EA analyzes the circumstances under which timber harvest activities may proceed in LSRs, the impacts on RR, balances the costs of the Project against the benefits, and concludes that the Project meets the appropriate criteria.

Impacts on Soil

The Forest Service adequately demonstrated the impacts to soils in compliance with the NFMA. See AR 7763-65; 8005; 8078-79. The EA contains a discussion of soil productivity, including a description of current conditions, and potential effects from the Project on loss of organic matter. AR 7749, 8034.

Aquatic Conservation Strategy

The EA also complies with the Forest Plan Aquatic Conservation Strategy (ACS). To comply with the ACS, the Agency must include a description of: (1) the existing condition; (2) the range of natural variability of the important physical and biological components of a given watershed; and (3) how the proposed project maintains the existing condition or moves it within the range of natural variability. AR 4327. The EA contains a thorough discussion of the Project's consistency with ACS objectives. See AR 8068-73. Plaintiff has not demonstrated that the Forest Service's analysis is deficient.

Plaintiff has failed to demonstrate the forest Service made a clear error of judgment in determining the Project conforms with the National Forest Plan. The Forest Service fully

1 complied with its obligations under the NFMA. The EA provides a comprehensive explanation
2 for its decision backed up with the best scientific information available. Plaintiff has not shown
3 otherwise.

4 **FOREST PLAN AMENDMENT**

5 The NFMA provides that the Forest Service may modify a forest plan “in any manner
6 whatsoever.” 16 U.S.C. § 1604(f)(4). NFMA’s implementing regulations provide that “[i]f the
7 change resulting from the amendment is determined not to be significant for the purposes of the
8 planning process, the Forest Supervisor may implement the amendment following the
9 appropriate public notification and satisfactory completion of NEPA procedures.” 36 C.F.R. §
10 219.10(f) (2000). See also 36 C.F.R. 219.35(b) (2010). The Forest Service demonstrated in the
11 EA that an amendment to the GPNF Forest Plan allowing the use of feller-buncher equipment in
12 advance of log removal on slopes up to 45% was necessary and appropriate. See AR 8015-17;
13 8040-41; 8224-26. Plaintiff has failed to demonstrate otherwise.

14 **CONCLUSION**

15 The Court, having heard oral argument, considered the motions, the responses, replies,
16 and the relevant documents herein, finds there are no genuine issues of material fact, and the
17 Defendants United States Forest Service and Janine Clayton are entitled to judgment as a matter
18 of law. An EIS is not required here.

1 Therefore, it is hereby **ORDERED** that:

2 Plaintiff's Motion Summary for Judgment (Dkt. 20 & 21) is **DENIED**.

3 Defendants' Cross-Motion for Summary Judgment (Dkt. 26) is **GRANTED**. Plaintiff's
4 action is **DISMISSED with PREJUDICE**.

5 Dated this 7th day of March, 2011.

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8 ROBERT J. BRYAN
9 United States District Judge
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